

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

LEE BOYD MALVO

*

Petitioner

*

v.

*

Civil Action No.: 13-1863 PJM

**RANDALL MATHENA, CHIEF WARDEN *
RED ONION STATE PRISON**

*

and

*

**DOUGLAS F. GANSLER,
as ATTORNEY GENERAL FOR
THE STATE OF MARYLAND**

*

*

Respondent

*

MOTION FOR STAY

Petitioner, Lee Boyd Malvo (“Mr. Malvo”), through his counsel, William C. Brennan, Jr., Esq., and Brennan McKenna, Chtd, pursuant to this Court’s Order of October 31, 2016 (requiring further briefing), moves to stay and hold in abeyance the instant proceedings for the following reasons:

1. On October 10, 2006 Mr. Malvo plead guilty to six counts of first degree murder in the Circuit Court for Montgomery County, Maryland in Case No. 102675C. Mr. Malvo was a minor (17 years old) at the time the crimes were committed.

2. On November 8, 2006 Mr. Malvo was sentenced to six terms of life in prison without the possibility of parole, one for each count, all to be served consecutively.

3. Mr. Malvo did not appeal his sentences to either Maryland State courts or to the federal courts.

4. Mr. Malvo has now challenged the legality of his sentences in Maryland State Court. On Thursday, January 12, 2017 Mr. Malvo, through the Office of the Public Defender of the State of Maryland, filed a Motion for Appropriate Relief (To Correct Illegal Sentence) in his underlying state case. [See, docket entry # 69: Circuit Court for Montgomery County, 102675C, attached.]

5. That challenge is based upon the United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), which held, in part, that mandatory life imprisonment without the possibility of parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishment. This rule applies retroactively to Mr. Malvo under *Teague v. Lane*, 489 U.S. 288 (1989).

6. Mr. Malvo's judgment of conviction became final over one year ago; however, the "new rule" announced by the Supreme Court in *Miller, supra* did not go into effect until June 25, 2012, and should be retroactively applied to Mr. Malvo's case under *Teague, supra*. This instant petition was filed within one year of the date on which the rule in *Miller* initially went into effect as recognized by the United States Supreme Court.

7. Since Mr. Malvo is now challenging the legality of his multiple life sentences in Maryland State Court he should be allowed to exhaust his state court remedies before this Court rules on his Petition for Writ of Habeas Corpus.

8. This Court has the discretion to stay and hold in abeyance the instant proceedings. *Rhines v. Weber*, 544 U.S. 269 (2005). This Court should exercise that discretion.

- a. Mr. Malvo is currently challenging his two terms of life in prison without the possibility of parole stemming from two separate cases in the Commonwealth of Virginia. He is litigating those case in the U.S. District Court for the

Eastern District of Virginia *Malvo v. Mathena* (2:13-cv-00375) and *Malvo v. Mathena* (2:13-cv-00376).

- b. Mr. Malvo is now challenging his Maryland sentences in state court as referenced above.

9. It would be an abuse of discretion for this Court to deny a stay and to dismiss the instant petition because his similar claims are being litigated in federal court in Virginia and Mr. Malvo is now exhausting his state court claims. His claims are potentially meritorious, and there is no indication that he has engaged in intentionally dilatory litigation tactics. “In such circumstances, the district court should stay, rather than dismiss, the mixed petition.” *Rhines v. Weber*, 544 U.S. 269, 278 (2005)

WHEREFORE, Petitioner, Lee Boyd Malvo, through his counsel, respectfully requests that this Honorable Court grant the following relief:

- A. Stay and hold in abeyance the proceedings in the instant case; and
- B. Hold a hearing in the instant case (if necessary) upon the exhaustion of his state court proceedings and the completion of his federal hearings in the U.S. District Court for the Eastern District of Virginia; and,
- C. For such other and further relief to which the Petitioner is entitled.

Respectfully submitted:

Brennan McKenna

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Stay was served this 13th day of January, 2017, to all counsel of record via ECF/CM.

_____/s/_____
William C. Brennan, Jr.